Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

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SUMMARY

Qwest's reply comments focus on the extent to which disparate local franchising rules are impeding wireline competition in the video marketplace, the Commission's legal authority to preempt such anticompetitive requirements, and the need for new market entrants to have nondiscriminatory access to video content.

The video marketplace is not as competitive as NCTA and Comcast claim. While Qwest agrees that DBS plays an important role in the video marketplace, wireline video competition is not widespread. And the fact that wireline MVPDs such as Qwest are in fact competing head-to-head with incumbent CATV providers in some markets does not diminish the basic fact that wireline competition is still in its nascent stages, and that competitors are having an extremely difficult time deploying these services due to local franchising requirements.

Qwest strongly disagrees with NCTA's claim that as part of obtaining these local franchises, new wireline competitors should be required to match the same build-out requirements that governed the incumbent CATV providers when they obtained their monopoly franchises. Such overbuilding disproportionately favors incumbents and disadvantages competitors with no concomitant public benefits. As both the Commission and CATV providers have long recognized in the field of telecommunications service regulation, it is unrealistic to require that new market entrants commit to the same geographic service scope (and at the same timetable) that applied to incumbents in an earlier monopoly era. Instead of benefiting consumers, such requirements do little more than deprive consumers of competitive choices since they ensure that the incumbent CATV provider is not required to face the competition that the market would otherwise sustain.

Qwest submits that the Commission has clear legal authority -- as well as the duty -- to establish a national regulatory infrastructure for video, and to preempt state and local regulations that derogate these federal policies. To the extent that local franchising rules or state regulations are interfering with the development of a competitive video market, the Commission should take decisive action to preempt these state and local regulations that derogate federal policy. Qwest submits that the Commission should immediately commence a rulemaking proceeding to establish the scope of the Commission's proper preemptive action in the area of competitive entry of competitive wireline providers of video programming. In the alternative, the Commission could rely on a petition for declaratory ruling (or possibly a Section 10(c) forbearance petition) as the procedural vehicle pursuant to which the Commission could undertake such a proceeding.

The record in this proceeding confirms that MSOs have substantial incentive to force programmers into refusing to deal with competitors, and that some MSOs will exercise that power if the Commission gives them the opportunity to do so. This therefore makes a compelling case for the program access relief Qwest has requested in its initial comments: (1) extension of the October 2007 sunset of the exclusivity ban in the federal program access statute, and (2) recommending that Congress modify the statute to eliminate two major loopholes that undermine the law's effectiveness, *i.e.*, the terrestrial distribution and vertical integration loopholes.

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REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully submits its reply comments concerning the competitive issues raised in this proceeding regarding local franchising, the ability of new market entrants to obtain nondiscriminatory access to video content, and the need for the Federal Communications Commission ("Commission") to take an active role in promoting wireline-based video competition.

I. LOCAL FRANCHISING RULES ARE IMPEDING COMPETITION IN THE WIRELINE VIDEO MARKET.

The comments submitted by NCTA and Comcast paint a picture of the video market as a place that is already fully competitive, in which wireline multichannel video programming distributors ("MVPDs") are broadly competing with incumbent cable television ("CATV") providers throughout the country.[1] At the same time, NCTA cautions the Commission not to reform or preempt local franchising requirements, which it claims would "artificially skew" competition towards local exchange carriers ("LECs") such as Qwest through "disparate regulation" rather than relying on "market forces."[2] Taken together, the incumbent CATV

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[1] *See* NCTA Comments at 9-14 *and* Comcast Comments at 12-29.

[2] *See* NCTA Comments at 17-24.

providers are asserting that the Commission should continue the current regulatory regime.[3] In point of fact, however, the current regulatory structure discourages and disadvantages new market entrants. These anticompetitive conditions are contrary to the Commission's statutory obligation to foster a national, pro-competitive policy on delivery of video programming to the public.

While Qwest agrees that DBS plays an important role in the video marketplace, the real key to the public interest at this juncture is wireline video competition, which has not developed to anywhere near its potential. The fact that wireline MVPDs such as Qwest are in fact competing head-to-head with incumbent CATV providers in some markets does not diminish the fact that wireline competition is still in its nascent stages, and that the competitors are having an extremely difficult time deploying these services due to the current maze of local franchising requirements.[4] Wireline competitors do not have a level playing field, and are being held back from fully competing with incumbent CATV providers in the video marketplace by local regulations, primarily franchise conditions that make it impossible for a second wireline competitor to enter a local video market.

As Qwest, BellSouth, Verizon, SBC, Alcatel and other commenters have demonstrated in their comments, wireline LECs are having serious problems obtaining permission to enter the video market from local franchising authorities ("LFAs") – of which there are many thousands nationwide.[5] Local franchising effectively shields incumbents from competition by functioning

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[3] *See, e.g., id.* at 5-6 (suggesting that video competition is "intense" and that the Commission should "faithfully report to Congress in its 12th Annual Report what others so conspicuously see.").

[4] *See* SBC Comments at 3-7.

[5] *See* Verizon Comments at 6-14; BellSouth Comments at 4-12; SBC Comments at 10-15; Alcatel Comments at 8-10; Consumers for Cable Choice Comments at 2-3; Cincinnati Bell Comments at 5-9; United States Telecom Association Comments at 17-18.

as a roadblock to new market entrants, often with the active encouragement of the incumbent CATV providers.[6] The delays, conditions and expenses associated with these franchise processes are enormous, and are plainly slowing the pace at which wireline MVPDs are deploying competitive video services in many markets. As discussed in Section II *infra*, perhaps most destructive is the insistence of some franchise authorities -- generally at the instigation of incumbent franchisees -- that new competitors commit to the same "build-out" obligations that were imposed on the incumbent when it acquired its monopoly franchise. In still other markets, the franchising process is making deployment financially impracticable or legally impossible for wireline competitors to offer services, such as when the franchising authority refuses to act or denies a franchise application altogether. Overall, these local franchising barriers are dramatically slowing the development of wireline-based video competition.

The comments filed by the City of Ontario, California illustrate another problem. The City of Ontario's statements reveal a franchising authority that has not only prejudged the merits of build-out requirements, but that appears to be negatively predisposed towards allowing wireline LECs to enter the video market as competitors.[7] Worse, the City reveals that it has a conflict of interest – since it plans to enter the market as a wireline MVPD itself. Qwest submits

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[6] *See, e.g.,* Qwest Comments at 10-11, 15 (discussing threats of legal action against LFAs if they do not require an identical franchise requirement for competitors); BellSouth Comments at 5-6, 7-8, 10-12 (documenting active opposition of incumbent CATV providers to BellSouth's franchise applications and subsequent litigation). BellSouth also documents efforts by incumbent CATV providers to enact "level playing field" statutes and local ordinances that prohibit LFAs from granting franchises that do not mirror the terms of the incumbent's legacy franchise. *Id.* at 4-5 and Declaration of Thompson T. Rawls II at 3-4; *see also* SBC Comments at Attachment 1, p. 23, n.63. Once enacted, the incumbent CATV operators then exploit these statutes and ordinances to exhaust and discourage any would-be competitors. *Id.*

[7] City of Ontario Comments at 2-3. Specifically, the City of Ontario refers to competition between cable multiple system operators ("MSOs") and former Bell Operating Companies ("BOCs") as a "national intermodal duopoly," and states that even if a BOC deploys competitive video facilities, the City "strongly suspect[s] they will bypass lower-income neighborhoods in favor of more upscale residential communities." *Id.* at 1 and ¶ 4.

that if the franchising authority has already prejudged the merits of granting an additional wireline video franchise, and intends to compete head-to-head with its video franchisees, a wireline LEC applying for a franchise cannot possibly expect a fair reception. The fact is that regulatory imbalance at the local level is impeding competitive entry of wireline providers of alternative video services.

II. THE RATIONALE PROFFERED FOR ANTICOMPETITIVE LOCAL FRANCHISE REGULATIONS IS NOT MEANINGFUL.

Notwithstanding the above, NCTA's apparent support of telephone company entry into the MVPD arena is heartening. Indeed, Qwest agrees with NCTA that "the prospect of a major new competitor with the resources of the Bell Operating Companies should be beneficial to consumers . . ."[8] However, NCTA is wrong when it seeks to limit this competition by insisting that new wireline competitors should be required to agree to the same build-out requirements that marked early cable monopoly franchises. Those requirements often obligate a new entrant to construct its system in every community covered by its franchise, even when doing so is financially impracticable. This precludes competitive entry in markets that for years have been dominated by entrenched cable MSOs.

NCTA argues that any failure to insist that new competitive wireline entrants agree to these old monopoly build-out obligations would be unjust to incumbent CATV providers, would harm consumers, and would "distort competition."[9] These arguments misstate the problem.[10] As both the Commission and cable companies have long recognized in the field of

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[8] *See* NCTA Comments at 17.

[9] *Id.* at 24 (footnote omitted).

[10] As Qwest and other wireline video competitors have pointed out, incumbent CATV providers are pursuing a two-pronged policy of seeking minimal regulation for their own voice and data offerings, but seek maximal regulation for their competitor's video offerings. *See supra* at n.6.

telecommunications service regulation, it is completely unrealistic to insist that new entrants commit to the same scope of geographic service (and at the same timetable) that were agreed to by incumbents in an earlier monopoly era. The effect of such requirements is not, as NCTA argues, the extension of service to a larger universe of customers. To the contrary, such build-out requirements cannot realistically be met by a new market entrant, and they do little more than discourage competition and protect incumbents. This harms consumers rather than benefiting them. As Qwest discusses below, it is therefore important that the Commission commence a proceeding designed to enable fulfillment of national video policies mandated by Congress by preempting those state and local rules and requirements that significantly impede competition in the provision of wireline video competition.

Among other things, the existing regulatory opportunities available to incumbent cable television providers include the generous "effective competition" standard that takes effect as soon as wireline competitors such as Qwest deploy multichannel video service in their markets. Specifically, Section 76.905(b)(4) of the Commission's Rules states that a cable system is deemed subject to effective competition where an LEC merely offers comparable video programming services in the incumbent CATV provider's franchise area.[11] Once the LEC does this, the cable operator is free to target the LEC's potential customers with aggressive, long-term and area-specific discounts on its services that the incumbent CATV provider does not offer to the rest of its subscribers.[12] Since a CATV system subject to effective competition is not required to maintain uniform rates across its franchise area, an incumbent CATV provider in

[11] *See* 47 C.F.R. § 76.905(b)(4).

[12] *See* Broadband Service Providers Association ("BSPA") Comments at 14-18; RCN Telecom Services, Inc. ("RCN") Comments at 14-16.

Qwest's service area may undercut Qwest's entry by offering lower rates in the areas where Qwest plans to provide video service, before Qwest has gained even a single subscriber.[13]

Qwest's experience in the Phoenix, Arizona market demonstrates the effects of the liberal effective competition standard described above. In September 2002, the Commission's Media Bureau declared Cox Communications Phoenix ("Cox") subject to effective competition under the LEC entry test -- namely, based on anticipated entry by Qwest -- notwithstanding the fact that Qwest was uncertain at that time whether it was going to be able to complete the construction of its systems in the near future.[14] In fact, as of the date of the Media Bureau's decision, Qwest had only 38,234 subscribers in Cox's franchise areas, which was approximately 15% of Cox's video subscribership in Phoenix. With its video services deregulated, Cox has stepped up its competition with Qwest in Phoenix, and is aggressively entering Qwest's voice and data markets.[15] Cox, of course, has no obligation to "build-out" its local exchange facilities when it competes against Qwest in providing telecommunications.[16]

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13 Qwest does not suggest that these rules be rescinded. But the Commission should note the irony of cable companies obtaining regulatory freedom based on nascent competition and then seeking to use regulation to strangle that competition.

14 *In the Matter of: CoxCom, Inc. d/b/a Cox Communications Phoenix*, CSR-5897-E, Memorandum Opinion and Order, 17 FCC Rcd 17188, 17190 ¶ 5 (Media Bureau, 2002).

15 The comments submitted by RCN provide examples of deep, aggressive discounts by incumbent CATV providers that are targeted only to areas where the incumbent faces a new wireline competitor. These discounts for video, voice and data services are as much as 40% below the incumbent's regular rates, and are offered in return for abandoning the competitor's services. *See* RCN Comments at 14-16. Not only are such practices predatory, but they once again highlight the unequal regulatory treatment of competitors in the telephony market. Incumbent LECs are typically unable to meet their competitors' targeted discounts for voice and data, due to the Commission's time limits on promotional discounts, federal and state tariffing requirements, and other traditional common carrier regulations.

16 Cox Communications argued that the Commission could not grant Qwest forbearance from its unbundling obligations under Section 251(c) in geographic areas where Cox had only "partial coverage" over Qwest's network -- simply because Cox's business plan did not support building facilities to reach customers in those areas. *See* Ex Parte Letter from J.G. Harrington,

It is, of course, no surprise that Cox is permitted to deploy local telephone service free of any "universal build-out" obligation. Duplication of incumbent LEC networks on a tight time schedule as a prerequisite to competitive entry is something the Commission has repeatedly found to be uneconomic. On this basis, the Commission has pointedly refused to impose such obligations on cable television providers when they enter the voice and data markets.[17] Competitive market entry in the provision of local exchange services could not economically occur if competitive local exchange carriers ("CLECs") (including cable television-controlled CLECs) were required to immediately duplicate an exchange network as a prerequisite to commencing competition at all. For the same reason, it would be equally unrealistic for the Commission to permit local franchising authorities to require new wireline video entrants to commit to an overbuild of incumbent cable television systems as a prerequisite for market entry. The Broadband Service Providers Association, for example, correctly observes that requiring a new market entrant to replicate an incumbent's video network is inherently anticompetitive, since the incumbent has had decades to deploy its network and since the new market entrant does not have a guarantee of a return on its investments that most incumbents have enjoyed by virtue of their monopoly position in the market.[18]

Cox Communications, Inc., to Marlene H. Dortch, FCC Secretary, WC Docket No. 04-223, at 2-3 (June 30, 2005). Again, this is healthy so long as Cox cannot use the regulatory process to thwart competition.

17 *See* USTA Comments at 10, *citing In the Matter of the Public Utility Commission of Texas,* Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466 ¶ 13 (1997) *and In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002); *see also* Verizon Comments at 2 (noting efforts by CATV providers to avoid the universal service obligations of incumbent LECs when entering voice markets).

18 *See, e.g.*, BSPA Comments at 19; Verizon Comments at 10; Consumers for Cable Choice Comments at 3-4; Cincinnati Bell Comments at 9; *accord*, Qwest Comments at 3; *see also* Telecommunications Industry Association Comments at Attachment 1; CenturyTel Comments at 6-7.

Qwest does not claim that a rational or lawful video strategy would permit it to engage in "redlining" or other discriminatory treatment of various classes of people. That is not the point. Qwest and others are merely pointing out that the build-out requirements that some local franchise authorities are seeking are preventing competitive entry, and will continue to prevent it in the future. Regardless of NCTA's claims, incumbent CATV providers' insistence that wireline competitors commit to build-outs that match their service footprint is not a matter of "fairness," nor is it a matter of protecting consumers from "redlining" or discriminatory treatment. As Qwest and other carriers have documented mandatory build-out requirements serve no public purpose and simply prevent competitive video entry to the detriment of all consumers.[19]

III. THE COMMISSION HAS THE STATUTORY AUTHORITY TO PREEMPT ANTICOMPETITIVE LOCAL FRANCHISING REQUIREMENTS.

Qwest submits that the Commission has the authority and the duty to establish a national regulatory infrastructure for video, and to preempt state and local rules and power when the exercise of authority is in derogation of the federal mandate. There is no serious question that the Commission has the power to preempt state and local franchise requirements for cable operators upon a proper showing.[20] This authority is even greater now that the 1996 Act has further strengthened the federal interest in creating a national video policy.[21] To the extent that local franchising rules or state regulation are interfering with the development of a competitive

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[19] *See* Verizon Comments at 21; SBC Comments at 15-19; Alcatel Comments at 9-10; Cincinnati Bell Comments at 8.

[20] *See City of New York v. FCC*, 486 U.S. 57, 58-61 (1988); *National Cable Television Association, Inc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994).

[21] *See Southwestern Bell Wireless Inc. v. Johnson County Brd. of Commissioners*, 199 F.3d 1185, 1192-93 (10th Cir. 1999) *and Guidry Cablevision v. City of Ballwin*, 117 F.3d 383 (8th Cir. 1997).

video market -- and the evidence is clear that, at least in the case of wireline competitors to incumbent cable franchisees, such interference is immediate and destructive -- the Commission should take immediate and decisive action to assert the proper scope of federal jurisdiction through preemption.

To this end, the Commission should immediately commence a rulemaking proceeding to establish the scope of the Commission's proper preemptive action in the area of competitive entry of competitive wireline providers of video programming. In the alternative, the Commission could rely on a petition for declaratory ruling (or possibly a Section 10(c) forbearance petition) as the procedural vehicle pursuant to which the Commission could undertake such a proceeding. The exact scope of the Commission's preemption as exercised would depend upon the record actually developed, but Qwest sees preemption as a relatively simple matter:

- State and local franchise requirements would be preempted completely insofar as they stood as a barrier to entry by a competitive wireline video service provider.

- State and local control of public rights-of-way would remain intact under the same terms and conditions as apply in the case of open video systems.[22] In the case of incumbent LECs and others who already have access to rights of way, additional requirements could not be imposed on top of their access agreements.

- Discriminatory franchise fees would be preempted, but non-discriminatory fees would not be preempted.

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[22] *See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639 (1996); Second Report and Order, 11 FCC Rcd 18223 (1996); First Order on Reconsideration, 11 FCC Rcd 19081 (1996); Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996); Third Order on Reconsideration, 12 FCC Rcd 6258 (1997); Fourth Report and Order, 12 FCC Rcd 7545 (1997); *In the Matter of: Implementation of Section 302 of the Telecommunications Act of 1996, Open Video* Systems, *Time Warner Cable Petition for Reconsideration*, Order on Reconsideration, 13 FCC Rcd 14553 (1998); *see also City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), Order on Remand, 14 FCC Rcd 19700 (1999).

- Reasonable requirements for local public, governmental and educational channels could be maintained, so long as they are non-discriminatory and do not operate as an entry barrier (the Commission would determine whether a particular local proposal in this regard was reasonable). Construction and operation could commence while a determination was made as to the reasonableness of any particular proposed requirement.

The Commission should move quickly and directly to initiate a proceeding to undertake these necessary jurisdictional steps.[23]

IV. THE RECORD DEMONSTRATES THAT NEW MARKET ENTRANTS MUST HAVE NONDISCRIMINATORY ACCESS TO VIDEO CONTENT.

New competitors to cable unanimously agree that they cannot survive in the market without nondiscriminatory access to video content. This is no surprise, since content, along with technology, is a critical foundation of MVPD service. New competitors to cable also agree that they remain at constant risk of losing access to critical cable network programming (particularly regional sports networks), even with the protections of the current program access law. Further, even where programming is made available to them, new entrants report that they are required to pay discriminatory rates far in excess of what incumbent cable operators are required to pay.

The record in this proceeding confirms what the Commission already knows: MSOs have substantial incentive to force programmers into refusing to deal with the MSOs' competitors, and they will exercise that power if the Commission gives them the opportunity to do so.[24] The

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[23] The only party to address the preemption issue directly is Verizon, which states that, while the Commission has preemptive authority in this area, legislation might be a safer and ultimately more stable course of ensuring that the federal jurisdiction is properly protected and asserted. *See* Verizon Comments at 14-28. Qwest agrees with Verizon that legislation is always less vulnerable to judicial attack than is a pronouncement, no matter how well founded, by this Commission. Nevertheless, Qwest submits that the Commission's preemptive power is clearly secure enough to justify action without further guidance from Congress.

[24] *See* RCN Comments at 6-16; SBC Comments at 19-27; BellSouth Comments at 12-16; BSPA Comments at 12-18; NTCA Comments at 1-7 and 9-10; USTA Comments at 16-17; CenturyTel Comments at 10-12.

record therefore makes a compelling case for the program access relief Qwest has requested in its initial comments: (1) that the Commission extend the October 2007 sunset of the exclusivity ban in the federal program access statute, and (2) that the Commission should recommend to Congress that it modify the statute to eliminate two major loopholes that undermine the law's effectiveness, *i.e.*, the terrestrial distribution and vertical integration loopholes.

V. CONCLUSION.

Qwest reiterates its call for the Commission to take affirmative steps to promote wireline video competition by preempting those local franchising requirements that are functioning as barriers to entry. Likewise, the Commission needs to actively ensure that new market entrants will continue to have access to video content at reasonable rates, terms and conditions. Appropriate proceedings should be initiated promptly.

Respectfully submitted,

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October 11, 2005

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be (1) filed with the Secretary of the Federal Communications Commission via its Electronic Comment Filing System in MB Docket No. 05-255, (2) served, via email, on the FCC's duplicating contractor, Best Copy and Printing, Inc. at FCC@bcpiweb.com, and (3) served, via first class United States Mail, postage pre-paid, on the parties listed on the attached service list.

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